with power to the trial court to increase the period or, if there are special reasons, to order otherwise. If no disqualification is imposed or if the period of disqualification is reduced, the special reasons must be stated.

In the instant case, no special reason was stated by the learned trial magistrate though it appeared that he was persuaded by the respondent's plea respecting source of livelihood and for leniency.

At the hearing of this appeal, the respondent, upon my inquiry of him for reasons, if any, as to why the disqualification should not be imposed, advanced similar grounds as he did in the lower court though in somewhat more elaborate manner.

As to the test to apply in considering what, in law, amounts to a special reason, and the characteristics of a special reason, Adams J. said in *Re Kanapathipillai & Ors.*[1] :

"In *Whittall* v. *Kirkby* ([1947] 1 K.B. at p. 201) the Court of Criminal Appeal adopted the test applied in the Northern Ireland case of *R.* v. *Crossan* ([1939] N.I. 106) as to what in law amounted to a special reason. This test is as follows:

> 'A 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception.'

It follows from this that this limited discretion can never in any circumstances be exercised for a general reason since 'special' is the antithesis of general. The fact that a person is a first offender or that he has not committed a motoring offence for many years are therefore reasons of the most general character and cannot be special reasons. The fact that a person is required to drive for his livelihood or requires his vehicle for his business is not a special reason because it is special to the offender and not to the offence.

What facts constitute a special reason is a matter of law. If the court exercises its power of not endorsing or not suspending a licence for special reasons, the court must state what the special reasons are which lead the court to exercise it. This was decided in *R.* v. *Recorder of Leicester, Ex parte Gabbitas* [1946] 1 All E.R. 615. The facts of each case must be carefully considered and then if the magistrate considers that there are facts which are special to the facts of the case he can, if he so wishes, exercise the limited discretion that was given to him. It is impossible to lay down anything more specific because the facts which may constitute facts that are special to the offence must necessarily vary in every case."

Financial hardship to the offender (*Whittal* v. *Kirby*[2]; *Reay* v. *Young & Anor.*[3]) or that the offender knew of no other means of earning his livelihood (*Public Prosecutor* v. *M. Karthiah*[4]) or that the effect of the disqualification must necessarily and consequently deprive the offender of his livelihood or occupation (*Re Chan Eow Beng*[5]; *Public Prosecutor* v. *Teoh Gaik Beng, Public Prosecutor* v. *Chuah Khay Soon*[6]; *In re Muniandy*[7]) or that the offender was a poor man and would have difficulty to get to his work (*Public Prosecutor* v. *Mohd. Isa*[8] (albeit *obiter*)) is no special reason within the meaning of section 74(2) of the Road Traffic Ordinance 1958 to justify non-imposition of the disqualification.

The offence is not to be taken lightly because if an innocent road user is knocked down and injured or killed, he and/or his dependants may have no means of recovering from the uninsured driver any loss or damage he and/or they may have suffered or sustained.

In the instant case, I am constrained to hold that there exists no special reasons justifying the relief from the imposition of the disqualification. The appeal is allowed. The respondent is disqualified from obtaining or holding a driving licence for a period of 12 months from the date of conviction.

Order accordingly.

KARPAL SINGH S/O RAM SINGH v. MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & ANOR.

[O.Cr.J. (Peh Swee Chin J.) March 9, 1988]

[Ipoh – Criminal Application Nos. 54-1-88 & 54-3-88]

Administrative Law – Habeas corpus – Writ of – Application for – Various allegations raised by Minister – Mala fides – Meaning of – Error in allegation – Inaccurate and irrelevant allegation – Allegation outside the scope of Internal Security Act 1960.

Constitutional Law – Habeas corpus – Writ of – Application for – Whether applicant can be allowed to appear in court and argue his own case – Importance of habeas corpus proceedings.

The applicant who is a Member of Parliament, a State Assemblyman and an advocate and solicitor was placed

under detention by virtue of a detention order issued by the first respondent under section 8 of the Internal Security Act 1960. The applicant applied for a writ of *habeas corpus*. He challenged the detention order.

There were six allegations made against the applicant which formed the basis of the detention order. The present case centred on the sixth allegation which was that the applicant, at the place, time and on the date stated in the detention order, used the issue of appointing non-Mandarin qualified headmasters and senior assistants in the national-type Chinese primary schools to incite racial sentiments of the Chinese community. This allegation was later admitted by the Minister to be an error as the detainee did not on that date, time and place spoke of the issue.

Held, allowing the application: (1) there are three exceptions to the non-justiciability of the Minister's mental satisfaction in cases of this kind. They are (a) *mala fides,* (b) the stated grounds of detention not being within the scope of the enabling legislation, *i.e.* the Act, and (c) the failure to comply with a condition precedent;

(2) *mala fides* does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, *i.e.* for a purpose other than the purpose for which it is professed to have been exercised;

(3) although the error relating to the sixth allegation was probably made in the course of enquiries by the police, the Minister cannot rid himself of the error of the police because the process starting with the initial arrest of the applicant under section 73 of the Act pending enquiries until the execution of a detention order made by the Minister would appear to be a continuous one. Such being the case, any period or any part of such one continuous process can be looked into to see if the care and caution have been exercised with a proper sense of responsibility for the purpose of ascertaining if the detention order was properly made;

(4) viewed objectively and not subjectively, the error, in all the circumstances, would squarely amount to the detention order being made without care, caution and a proper sense of responsibility. Such circumstances have gone beyond a mere matter of form;

(5) the sixth allegation, though an irrelevant allegation which the court can enquire into, was also an inaccurate allegation that can be treated as being outside the scope of the Act;

(6) with regard to the contention that the detention order was necessary having regard to the first to fifth allegations, this court should not accede to the contentions.

[*Editorial Note:* A preliminary point was raised as to whether the applicant should be allowed to appear in court to argue his own case. The learned judge allowed the applicant's application and the reasons for the learned judge's decision is stated in the judgment.]

Cases referred to:

(1) *Lim Chin Chin, Theresa* v. *The Inspector-General of Police* [1988] 1 M.L.J. 293 (cited).
(2) *The Inspector-General of Police* v. *Tan Sri Raja Khalid bin Harun* [1988] 1 M.L.J. 182 (cited).
(3) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri* [1969] 2 M.L.J. 129 (cited).
(4) *Yeap Hock Seng* v. *The Minister of Home Affairs, Malaysia* [1975] 2 M.L.J. 279 (refd).
(5) *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 284 (refd).
(6) *The King* v. *Secretary for Home Affairs, ex parte Lees* [1941] 1 K.B. 72 (refd).
(7) *Liversidge* v. *Sir John Anderson* [1942] A.C. 206 (refd).
(8) *State of Bombay* v. *Atma Ram* A.I.R. 1951 S.C. 157 (refd).
(9) *Re Application of Tan Boon Liat* v. *Menteri Hal Ehwal Negeri* [1976] 2 M.L.J. 83 (cited).
(10) *Tan Boon Liat* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* [1977] 2 M.L.J. 18 (cited).

HABEAS CORPUS APPLICATION.

Applicant in person.

Mohamed Noor bin Hj. Ahmad, Senior Federal Counsel (*Mohamed Zaki bin Mohamed Yasin,* Deputy Public Prosecutor (Perak), with him) for the respondents.

Cur. Adv. Vult.

Peh Swee Chin J.: The applicant (hereafter called the detainee), who is a Member of Parliament, a State Assemblyman and an advocate and solicitor, is presently under detention by virtue of a detention order issued by the first respondent (hereafter called the Minister) under section 8 of the Internal Security Act 1960 (hereafter called the Act).

The applicant has applied to this court for a writ of *habeas corpus* to be set at liberty by challenging the said detention order on various grounds.

Before dealing with the merits and demerits of the application, I ought to give grounds of my decision in allowing the issue of an order to produce the detainee in court on the day of hearing for him to argue his own case and disallowing the learned Senior Federal Counsel's application to have the same set aside and the detainee barred from arguing his own case.

The detainee, on filing his application by motion, by para 12 of his affidavit filed in support of the motion dated January 12, 1988, expressly sought leave to be present in court on the day of hearing to argue his own case. Further, by para 13 of the same affidavit, the detainee drew the attention of the court to rule 93(1) of the Internal Security (Detained Persons) Rules 1960 to support his application for leave to be present to argue his own case. Rule 93(1) provides:

"Whenever the presence of a detained person is required by any court of civil or criminal jurisdiction such court may issue an order addressed to the superintendent requiring production before the court of such person at the time and place to be named in such order, and the said superintendent shall cause the person named in such order to be brought up as directed, and every such court may by endorsement on such order require the person named therein to be again brought up at any time to which the matter wherein such person is required may be adjourned."

Quite apart from anything else, the said rule 93(1) confers unmistakbly a discretion to allow the detainee to be present on the day of hearing to argue his own case, and this the learned Senior Federal Counsel also conceded to.

I was not unmindful of the practice of the courts which, I believe, have followed the practice of the English courts which do not allow access to a prisoner other than by and through his counsel in an application for a writ of *habeas corpus*, a practice popularly known to be intended to curb the abuse of litigious or bored prisoners.

The court has allowed the detainee, however, to be present to argue his own case, in particular, for the following reasons.

An application for a writ of *habeas corpus* has always been traditionally regarded by the courts as urgent business and is entitled to have precedence over all other matters. Such being the case, it would be undesirable to have any adjournment on the date of hearing as fixed. To avoid this potential situation, the detainee's presence would be required on such a date of hearing. An order was therefore issued to have the detainee produced in court on the date of hearing. In this connection, it is interesting to compare this with the hearing of an appeal by an armed robber against his conviction; a similar order would have been always automatically issued for him to be present.

Further, the detainee appeared to be one of the leading counsel in Malaysia for cases of the kind in which the detainee was personally involved; to bar him from appearing in court to argue for his own liberty would be a phenomenon this court found it difficult to accept; it would be against the ordinary sense of fairness.

Further, from the newspaper report of the hearing of the Supreme Court Criminal Appeal No. 86 of 1987 (*Lim Chin Chin, Theresa* v. *The Inspector-General of Police*[1]) and other related appeals concerning their arrest under the Act, the detainee herein was brought out from his detention recently to argue as counsel for these appellants, apparently through the good offices of the learned Attorney General or his officers.

Further, the present case appeared to be distinguishable significantly from those above-mentioned Supreme Court appeals; there the courts were concerned with the arrest and detention of detainees expressly authorized under the Act for and pending enquiries necessary to be carried out for enabling the Minister to exercise his discretion in making a detention order or a restriction order under section 8 of the Act. In the instant case, the detention was based on the detention order of the Minister, which was based, in turn, on a statement containing six allegations of facts, one of which the detainee sought to establish as being untrue by means of a number of affidavits from a number of deponents so that the judgment in the Supreme Court on those appeals would not make the present case an open-and-shut case so that, further, the detainee's presence in court could not be regarded as inconsequential or for the purpose of relieving his boredom.

In all circumstances, I allowed to remain the order issued earlier to have the detainee produced in court for him to argue his own case.

With hindsight, it was just as well that the detainee was allowed to argue his own case for the detainee proved to be in a position to match the learned Senior Federal Counsel's effective conduct and advocacy in this case.

It would be superfluous to deal with the law of the writ of *habeas corpus* in relation to detention under the Act for it has been so often admirably and well set out in the previous decisions of the High Court, Federal Court and very recently in the judgment of the Supreme Court, *viz. The Inspector-General of Police* v. *Tan Sri Raja Khalid bin Harun*[2]. It would only be necessary, however, to re-state a few of such principles, in the light of which my decision later can be seen.

In this connection, my approach to the very large number of authorities from the Indian Supreme Court as cited would be to resort to them only when our own authorities are silent on any particular point, for the obvious reason of the doctrine of binding judicial precedents. The approach does not, however, supress my admiration for the Indian Supreme Court's decisions which appear to have taken the law of judicial

review of cases of detention without trial, grudgingly permitted by both the Indian Constitution and our Constitution, to another level which for reasons of expediency has not always been found acceptable in our country, in particular, because of different conditions that obtain in this country. Please see the judgments of the late Ong C.J. and Suffian F.J. (as he then was) in *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri.* [3]

The detention order was made under section 8(1) of the Act as follows:

"If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years."

The detention order is in following words, per a certified translation:

" Internal Security Act 1960
Detention Order
(Section 8(1))

To:
Superintendent
Protected Detention Place, Taiping

Inspector General of Police,
Bukit Aman – Kuala Lumpur;

To all Officers of Royal Malaysian Police and
All other persons concerned.

That I, being satisfied that this order is necessary, make against the person mentioned below with an intention of preventing the said person from acting prejudicial to:

(a) the security of Malaysia,
(b) ...
(c) ...

Name	Identity Card No.
Pen/1282 – Karpal Singh s/o Ram Singh	1836865 (B)

And that in exercising the powers conferred upon me under section 8(1) of the Internal Security Act 1960, that I, the Minister of Home Affairs, Malaysia, direct with this order that the person whose name is stated above to be detained for a period of two years effective from the 19th day of December, 1987 at Protected Detention Place, Taiping or any other place as directed by me from time to time.

Made on this 18th day of December, 1987.

(Dr. Mahathir bin Mohamad)
Minister of Home Affairs,
Malaysia.

(Bil. Khedn. R. 205/1182/4-)
6560"

The statement served with the detention order is in the following words from a certified translation of the same:

" Statement Under Section 11(2)(b)
Internal Security Act 1960

Name of Detainee: Karpal Singh a/l Ram Singh
Identity Card No.: 1836865 (B)

Grounds for the Detention Order

That since the year 1980 until the date of arrest on October 27, 1987 you Karpal Singh a/l Ram Singh have involved in activities that would incite racial sentiments amongst the multi-racial community of this country. These activities of yours could lead to an atmosphere of tension and enmity among the races in this country and endanger the security of the country.

Particulars of Charges

1. On February 29, 1980 while speaking in a dinner party at Silaiton Restaurant, Number 4636, Jalan Pantai, Butterworth, Pulau Pinang organized by the Democratic Action Party Bagan Jermal Branch, you alleged that the government is only interested in one race only and stressed for liberty and the rights of other races.

2. On January 11, 1982 at an emergency meeting Democratic Action Party, Penang State which was held at No. 123-D, Jalan Batu Lancang, Pulau Pinang you alleged that rights of studying one's mother tongue of non-Malays is obstructed by the government by implementing 3M curriculum. At the same meeting you also alleged that the interest and fundamental rights of Chinese and Indians are not safe-guarded and requested the public specially the parents to oppose the implementation of 3M curriculum in the Chinese and the Indian primary schools.

3. On March 2, 1986 at a gathering in the compound of Kuan Im Temple, Pitt Street, Pulau Pinang you quoted the case of Sim Kie Choon and Datuk Mokhtar Hashim to incite clash between the Malays and Chinese.

4. On August 16, 1986 at a forum organized by the Democratic Action Party, Pulau Pinang which was held at Kelab Ilham, No. 225, Jalan Macalister, Pulau Pinang you accused that the new economic policy is only in favour of one race *i.e.* the Bumiputras only.

5. On September 5, 1987 while speaking at the Arumugam Pillai Hall, Jalan Kulim, Bukit Mertajam, Pulau Pinang you alleged that the Malaysian Chinese Association (M.C.A. Party) and the Gerakan Rakyat Malaysia had sold the fundamental rights of non-Malays to the United National Organization (U.M.N.O.)

6. On October 10, 1987 at a gathering in front of Tuanku Syed Putra, Lebuh Downing, Pulau Pinang you used the issue of appointing non-Mandarin qualified headmasters and senior assistants in the national-type Chi-

nese primary schools to incite racial sentiments of the Chinese community.

as directed
(Ibrahim bin Mamat)
For Chief Secretary
Minister of Home Affairs Malaysia

Seal
Ministry of Home Affairs
Malaysia."

To understand better both the detention order under section 8 and the statement containing the six allegations of fact under section 11(2)(b) of the Act, according to the edifying dichotomy of them by Suffian F.J., as he then was, in the leading judgment of the landmark case, *i.e.* the case of *Karam Singh,*[3] the purpose of the detention order would be to prevent the detainee from acting in a manner prejudicial to the security of Malaysia. The ground of the detention order would be to the effect that since 1980 until the date of arrest on October 27, 1987, the detainee has carried out activities which inflamed racial feelings among the various communities *etc.* The detention order was, of course, based on the six allegations of fact which I would regard as being integral factual grounds for the detention order.

In *Karam Singh's* case,[3] Suffian F.J. (as he then was) had this to say at p. 150:

"In this matter with respect I agree with the reasoning of the minority judgment by Sastri J. in *Atma Ram* that when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation. Indeed the logical result of the argument advanced by Dato' Marshall would be to invalidate section 8 of the Internal Security Act in so far as it purports to make the satisfaction of the government the sole condition of a lawful detention."

This passage adequately sums up the most important principle that may be deduced from that case. The court cannot therefore review such mental satisfaction of the Minister, but this statement cannot be regarded in absolute terms as there are three clearly discernible exceptions through the cases and they will be dealt with later.

There is a fairly strong justification for the passage in matters of national security for which the executive arm of the government should have indeed the last word, the review of which by the judicial arm of the government should be avoided scrupulously except in any of those three exceptions, to which facts and circumstances in any particular case irresistibly give rise. Please see the judgment of the learned Lord President in *Tan Sri Raja Khalid's* case.[2] The factor of national security indubitably weighs down the scale as compared with the most precious asset of an individual, *i.e.* liberty of the person, even though judges of pristine times, uncomplicated by the developments of the later 19th and 20th centuries, were wont to proclaim, in the case of loss of liberty without trial, that *justitia fiat ruat coelum, i.e.* let justice be done though heaven should fall.

Thus a court cannot inquire into the sufficiency, vagueness and relevancy of any grounds of such detention *vide Karam Singh's* case.[3] The word "relevancy" requires some fine tuning, in my view, from the cases decided by the courts. Relevancy that the court cannot inquire into does not, however, extend to any case where the grounds of detention stated are not within the scope of the enabling legislation, *vide* the judgment of Abdul Hamid C.J. sitting as a judge of the first instance in Kuala Lumpur High Court Criminal Application No. C.R. 54-29-87 (*Theresa Lim Chin Chin* v. *The Inspector General of Police.*) Please see the judgment of E. Abdoolcader J. in *Yeap Hock Seng* v. *The Minister of Home Affairs, Malaysia.*[4]

The three exceptions to the non-justiciability of the Minister's mental satisfaction per Abdul Hamid C.J. in *Theresa Lim Chin Chin's* case (Kuala Lumpur High Court Criminal Application No. CR 54-29-87) are (1) *mala fides,* (2) the stated grounds of detention not being within the scope of the enabling legislation, *i.e.* the Act, in this case, and (3) the failure to comply with a condition precedent. Please see his Lordship's judgment, *supra.*

One of the many issues raised by the detainee is *mala fides,* that is, the detention order was made *mala fide.* The point was raised in connection with allegation of fact no. 6, set out above.

The most extraordinary state of affairs in this case is that, of the six specific past activities of the detainee, as set out respectively in the six allegations of fact, allegation of fact no. 6 is admittedly incorrect or not true in the sense that the detainee did not at the place, time and on date stated, use the issue (by speaking) of non-Mandarin qualified headmasters in Chinese national-type primary schools *etc.* Very properly and fairly, the Minister

has admitted that this allegation no. 6 is an error, but it was said to be due to an oversight. The detainee submitted that this showed the casual and cavalier attitude in regard to the issue of the detention order as to amount to *mala fides.*

Mala fides does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, *i.e.* for a purpose other than the purpose for which it is professed to have been exercised. Please see Azmi L.P.'s dictum in *Karam Singh's* case.[3] According to Ong C.J. in *Karam Singh's* case,[3] the words appear to have an extended meaning "in the serious matter of depriving a citizen of his liberty without trial". In *Karam Singh's* case,[3] Ong C.J. had this to say about *mala fides* or want of good faith (*i.e.* lacking wholly of good faith):

"I am given to understand, such vagueness or ambiguity should be regarded by this court as intrinsic evidence – apart from criticisms of the grounds and allegations of fact supplied to the appellant – showing that the decision of the Cabinet had been made without the care and consideration that is essential where an order is made in good faith. In this connection want of good faith, of course, means no more than that, in the serious matter of depriving a citizen of his liberty without trial, there was absence of care, caution and a proper sense of responsibility. On this interpretation of *mala fides* there is no difference of opinion. If it was true that the order came to be made in a casual or cavalier fashion, it cannot properly be said that the Cabinet or the Minister concerned had been "satisfied". On the other hand, if the decision was made upon a proper evaluation of the facts and surrounding circumstances and after due deliberation, that was all which could be required for the issue of an order based on subjective satisfaction. In the final analysis, the issue is one of fact."

The passage quoted above was relied on by the detainee. The learned Senior Federal Counsel did not question its validity, and in fact *Karam Singh's* case[3] was very much the cornerstone of all his argument.

Having regard to the passage, the issue of *mala fides* raised resolves itself in the final analysis into a simple and neat question: was the detention order in this case made without care, caution and a proper sense of responsibility?

In fact, the question just formulated was raised in *Karam Singh* itself. In that case, the purpose of detaining Karam Singh was stated in the alternative, to quote: "with a view to preventing him from acting in any manner prejudicial *to the security of Malaysia/the maintenance of public order therein/in the maintenance of essential services therein.*" The printed words in the detention order in that case followed the language of section 8 of the Act, and the failure of the Minister to delete the second and third limbs (while the statement containing the allegations of fact referred exclusively to the first limb of preventing him from acting in a manner prejudicial to the security of Malaysia) was held, in effect, to be immaterial , on the ground, *inter alia,* that it was related to a matter of form and not of substance. The Federal Court followed with approval the decisions in *Greene* v. *Secretary of State for Home Affairs,*[5] *The King* v. *Secretary for Home Affairs, ex parte Lees*[6] and above all, the majority judgment of *Liversidge* v. *Sir John Anderson,*[7] and the minority judgment of the Indian Supreme Court case, *i.e. State of Bombay* v. *Atma Ram.*[8] I will set out in an annexed list all the cases cited by both counsel in arguments.

To seek the answer to the question formulated by the court as to whether the detention order was made without care, caution and a proper sense of responsibility, first, the learned Senior Federal Counsel, with considerable candour, agreed that the Assistant Secretary of the Ministry of Home Affairs, Encik Ibrahim bin Mamat, was careless in the drafting of the allegation of fact no. 6. It would appear from the affidavit of the said Assistant Secretary that on receiving the case file from the police he found that it contained a recommendation that the detention order be made under section 8(1) of the Act. On December 18, 1987, the detainee's case was submitted to the Minister for his consideration. On December 19, 1987, he prepared and signed the allegations of fact on the direction of the Minister. He said further, that, except for the oversight (error), the allegations of fact contained all the facts presented to the Minister for his consideration.

I am not satisfied at all that the allegation of fact no. 6, as drafted in error by the Assistant Secretary, was a mere fiction from a figment of the Assistant Secretary's imagination. He could not possibly have invented the date and time mentioned in the allegation of fact no. 6. He prepared it on the direction of the Minister. It is inconceivable that the case file from the police did not contain his allegation of fact no. 6. The same file must have been given to the Minister for his consideration and to the Assistant Secretary to help him draft the six allegations of fact. The error in my view has originated from the police, undetectable by both the Minister and the Assistant Secretary of the Ministry.

It will be clear that the extant error relating to allegation of fact no. 6 as presented to the Minister for his consideration was not of the Minister's make or the Assistant Secretary's. It must have been made in the course of enquiries by the police.

I do not think, however, that the Minister can rid himself of the error of the police because the process starting with the initial arrest of the detainee under section 73 of the Act pending enquiries until the execution of a detention order made by the Minister would appear to be a continuous one, per Tun Mohd. Salleh, Lord President, in the Supreme Court case of *Lim Chin Chin, Theresa*[1]. Such being the case, any period or any part of such one continuous process can be looked into to see if the care and caution have been exercised with a proper sense of responsibility for the purpose of ascertaining if the detention order was properly made.

Viewed objectively, and not subjectively, the error in all the circumstances would squarely, in my view, amount to the detention order being made without care, caution and a proper sense of responsibility. Such circumstances have gone beyond a mere matter of form. The applicant should therefore succeed on this ground alone.

Of the rest of the issues, there is only one which has real substance, on which alone the detainee should also succeed, also in connection with the extraordinary error about the allegation of fact no. 6, the like of which, I do not suppose, is likely to recur in future cases. I will deal with it as follows.

The inaccurate allegation of fact no. 6 would appear to be an irrelevant allegation, an irrelevant allegation of the type that the court can enquire into, because such an inaccurate allegation of fact can be treated as being outside the scope of the Act, as it must be, for the allegation of fact no. 6 though made under and pursuant to the Act, was inaccurate.

However, the Minister has said in his affidavit that notwithstanding allegation of fact no. 6, he was satisfied, with regard to allegations nos. 1 to 5, that it was necessary to make the detention order to prevent the detainee from acting in a manner prejudicial to the security of Malaysia. I find all this quite persuasive.

The detainee's answer was that the Minister must be satisfied before or at the time he made the detention order and not afterwards. The persuasiveness of this argument is equally self-apparent for otherwise it could bring about a situation where a detention order can be made first, and the maker satisfies himself as to its necessity later.

In *Re Application of Tan Boon Liat* v. *Menteri Hal Ehwal Dalam Negeri*[9] Abdoolcader J. said at p. 84:

> "I held in my judgment in *Yeap Hock Seng* v. *The Minister of Home Affairs, Malaysia* that although the courts are precluded from adjudicating on the sufficiency of the subjective satisfaction of the Minister they can examine the grounds disclosed by the Minister for the detention to see whether they are germane and relevant to the object which the Ordinance prescribes. In other words, it is open to the courts, in determining the validity of any order of preventive detention, to consider whether the grounds of the detention fall within the scope of the law as the preventive detention under which the order professes to be made. An order of detention based on irrelevant grounds is invalid and if any of the grounds furnished to the detenu are found to be irrelevant while considering the application of the relevant legislation under which the detention is ordered and in that sense are foreign thereto, the satisfaction of the detaining authority on which the order of detention is based is open to challenge and the detention order liable to be quashed (*Rameshwar Shaw* v. *District Magistrate, Burdwan & Anor.*)"

The Federal Court, on an appeal from the decision of his Lordship, upheld the decision.[10]

The passage quoted could not have escaped their Lordships' attention in the Federal Court, and nowhere was it pointed out as erroneous and it would appear to have been approved. If their Lordships were to be said later to have left the view in this passage open, without any decision thereon, I would with respect, speaking for myself, express my entire agreement with the passage.

Speaking further with reference to this passage, the detention order was made on December 19, 1987, and that means the Minister was satisfied on December 19, 1987, after he had considered together the six allegations of fact, including the unfortunate allegation of fact no. 6 which proved to be untrue as regards the detainee, and was therefore foreign to the Act. The combined effect from considering together all the six allegations of fact must have caused the Minister to be satisfied as to the necessity of the order of detention.

However, to repeat, the Minister has said that notwithstanding allegation of fact no. 6, he was satisfied as to the necessity of the detention order having regard to the rest of the allegations of fact,

viz. allegations of fact nos. 1 to 5. With very great respect to the Minister, and without in any way wishing to doubt the Minister's probity in this matter, I do not think the court should accede to this persuasive statement for the following reasons.

First, it would render a dead letter the statement of the law contained in Abdoolcader J.'s passage *(supra).*

Secondly, it would set a precedent and open the floodgate to other cases in future to all other detaining authorities to plead similarly, thereby effectively causing the three exceptions set out by Abdul Hamid C.J. aforesaid to cease to exist altogether, the three exceptions having evolved by the dictates of justice over a long period of time through the cases.

Thirdly, there is considerable force in the submission that the Minister must be satisfied at the time of making the detention order, and not later, as to its necessity for same.

Fourthly, it would be open to the apparent objection or criticism later that that it would amount to condoning an authority re-exercising his discretion to relate back to his prior order of deprivation of some other person's liberty when the original exercise of his discretion culminating in the prior order has been found to have been affected materially by a factual error, however, unintentional or innocent the error may be.

It is interesting but not essential for the court's decision to refer to the detainee's submission that allegation of fact no. 6 was the straw that broke the camel's back; I understood him to mean that allegation of fact no. 6 has played a crucial part in the Minister's exercise of his otherwise non-justiciable discretion or satisfaction in making the detention order. I think the detainee has struck a chord. Most of the whole nation could not have been oblivious to or could have failed to watch the issue of non-Mandarin speaking headmasters mentioned in the allegation of fact no. 6 being bandied about, first in amazement, then with horror and finally with a fairly audible sigh of relief on hearing the Prime Minister's announcement on the floor of Parliament of the mass arrests and banning of public rallies.

To revert to the matter in hand, on the second ground about the erroneous allegation of fact no. 6 being outside the scope of the Act, the applicant also succeeds.

I therefore order the issue of the writ of *habeas corpus* to have the applicant brought up before the court to be set at liberty. The applicant is therefore to be released and discharged forthwith.

Order accordingly.

APPENDIX

LIST OF AUTHORITIES

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3. *Law of Habeas Corpus* by Sharpe – pp. 216 to 218.
4. *Yeap Hock Seng* v. *Minister of Home Affairs, Malaysia* [1975] 2 M.L.J. 279.
5. Section 8(1) Internal Security Act 1960.
6. *Charles Sobraj* v. *Supt. of Central Jail, Thar* A.I.R. 1978 S.C. 1514.
7. *Yit Hon Kit* v. *Minister of Home Affairs & Anor.* (High Court Penang Criminal Application No. 54-3-86) (Unreported).
8. *Koh Yoke Koon* v. *Minister of Home Affairs & Anor.* [1988] 1 M.L.J. 45.
9. *M.R.S. Mani* v. *District Magistrate* A.I.R. 1950 Madras 162.
10. *Icchu Devi* v. *Union of India* A.I.R. 1980 S.C. 1983.
11. *Re Tan Boon Liat* [1977] 2 M.L.J. 108.
12. *Public Prosecutor* v. *Phon Nam* [1987] 1 C.L.J. 299.
13. *Motilal Jain* v. *State of Bihar* A.I.R. 1968 S.C. 1509 at 1512 para. 6(c) & at 1513.
14. *Hem Lall Bhandari* v. *State of Sikkim* A.I.R. 1987 S.C. 762.
15. *Ram Krishnan* v. *State of Delhi* A.I.R. 1953 S.C. 318 762 at 763.
16. *Bakthawar Singh* v. *The State* A.I.R. 1951 Simla 157 at 161.
17. *Sunil Kumar* v. *West Bengal Government* A.I.R. 1950 Cal. 274 at 286.
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20. Act A61 (Amendment to section 8 I.S.A.).
21. E.O. section 4(1).
22. *Jagan Nath Biswan* v. *State of West Bengal* A.I.R. 1975 S.C. 1516.
23. *SK. Serajul* v. *State of West Bengal* A.I.R. 1975 S.C. 1517.
24. *Md. Sahabuddin* v. *District Magistrate, 24 Parganas & Ors.* A.I.R. 1975 S.C. 1722.
25. *Rabindra Kumar* v. *State of West Bengal* A.I.R. 1975 S.C. 1408.
26. *Lakshman* v. *State of West Bengal* A.I.R. 1974 S.C. 1264.
27. *Kamalkar* v. *State of M.P.* [1983] Cr. L.J. 1928.
28. *Abdul Munnaf* v. *State of West Bengal* A.I.R. 1974 S.C. 2066.
29. *S.S. Kanda* v. *Government of Malaysia* [1962] M.L.J. 169.
30. *Bhat Nath* v. *State of West Bengal* A.I.R. 1974 S.C. 300 at 303, 307, 309.

31. Article 22 Indian Constitution.
32. *IGP* v. *Tan Sri Raja Khalid* [1988] 1 M.L.J. 182.
33. *P. Mukherjee* v. *State of West Bengal* A.I.R. 1970 S.C. 852 at 857.
34. *Khudiram Das* v. *State of West Bengal* A.I.R. 1975 S.C. 550 Lal at 554, 555.
35. *Shalini Soni* v. *Union of India* A.I.R. 1981 S.C. 431.
36. *Shibban Lal Saksena* v. *State of Uttar Pradesh* A.I.R. 1954 S.C. 179.
37. *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 M.L.J. 129, 136.
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39. *Dwarika Prasad* v. *State of Bihar* A.I.R. 1975 S.C. 134.
40. *Mintu Bhakta* v. *State of West Bengal* 1973 Supreme Court cases (Cri.) 732.
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43. *Re 33 Burne Road, Balham Byrnlea Property Investment Ltd.* v. *Ramsay* [1969] 2 All E.R. 311.
44. *Aminah* v. *Supt. of Prison Pengkalan Chepa Kelantan* [1968] 1 M.L.J. 92.
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46. *Madhu Limaye* v. *State* A.I.R. 1959 Punjab 506.
47. *IGP & Anor.* v. *Lee Kim Hoong* [1979] 2 M.L.J. 291 at 292.
48. *Emergency Powers in Malaysia: Development of the Law 1957 – 1977* by S. Jayakumar. [1978] 1 M.L.J. ix
49. *Ooi Ah Phua* v. *Officer-in-Charge Criminal Investigation Kedah/Perlis* [1975] 1 M.L.J. 93.
50. *Ooi Ah Phua* v. *Officer-in-Charge Criminal Investigation Kedah/Perlis* [1975] 2 M.L.J. 198.
51. Internal Security (Advisory Board Procedure) Rules 1972.
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53. Section 19 Police Act 1967.
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55. *Kuso Sah* v. *State of Bihar* A.I.R. 1974 S.C. 56.
56. *Roseniati bte Mahmud* v. *The Commandant Pusat Latihan Dadah, Sg. Petani, Kedah* (High Court Kangar Criminal Application No. 54-02-87) (Unreported).
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59. *Bir Bhadra Pratap Singh* v. *D.M. Azamgarh* A.I.R. 1959 All 384.
60. *Assa Singh* v. *Menteri Besar, Johore* [1969] 2 M.L.J. 30.
61. *Saul Hamid bin Pakir Mohamed* v. *Public Prosecutor* [1987] 2 M.L.J. 736.
62. *Re P.E. Long @ Jimmy & Ors.* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* [1976] 2 M.L.J. 133.
63. *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* [1976] 2 M.L.J. 83 (High Court).
64. *Re Application of Tan Boon Liat & Ors. Tan Boon Liat* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* [1977] 2 M.L.J. 18 (Federal Court).
65. *Halsbury's Law of England* Vol. 1 4th Ed. at pp. 32 – 33.
66. *Emperor* v. *Sibnath Banerji* A.I.R. 1945 Federal Court 75.
67. *Emperor* v. *Sibnath Banerji* A.I.R. 1945 P.C. 156.
68. *Narayanaswami* v. *Inspector of Police* A.I.R. 1949 Madras 307.
69. *Khalid Panjang & Ors.* v. *Public Prosecutor (No. 2)* [1964] M.L.J. 108.
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71. *Lim Chin Chin & 2 Ors.* v. *IGP* (High Court Criminal Application No. C.R. 54-39-87) (Unreported)
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76. *Jai Singh* v. *State of Jammu & Kashmir* A.I.R. 1985 S.C. 764.
77. *Ashadevi* v. *K. Shivraj* A.I.R. 1979 S.C. 447.
78. *R.* v. *Governor of Brixton Prison, Ex parte Ahsan & Ors.* [1969] 2 Q.B. 222.
79. *The State of Bombay* v. *Atma Ram Shridhar Vaidya* A.I.R. 1951 S.C. 157.
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